No. 7344

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WELLS FARGO BANK & UNION TRUST CO. (a corporation),

Appellant,

vs.

WILLIAM C. McDUFFIE, as Ancillary Receiver of Richfield Oil Company of California,

Appellee.

APPELLANT'S ANSWER TO APPELLEE'S PETITION FOR A REHEARING.

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The extensive Petition for a Rehearing filed by appellee in these proceedings involves in substance only three points. First, that this Honorable Court unduly narrowed the application of the parol evidence rule in determining the subject matter of the acceptance agreement dated October 4, 1930, and that appellee did not have an opportunity to be heard with respect to this phase of the Court's decision; second, that at the beginning of the transactions involving foreign collections the appellant bank, by agreement, waived its banker's lien and right of set-off against all of the foreign collections, and third, that appel-

lant, subsequent to the appointment of the Receiver, waived its banker's lien and right of set-off.

It is primarily to the first of these three points (separated into two parts in appellee's petition), that our reply will be directed because, in fairness to appellee and to the skill and ability of his counsel, it must be conceded that the arguments in support of the waiver of the right of lien or set-off, either at the inception of the transactions or after the appointment of the Receiver, were as skillfully and as thoroughly presented in the greater part of the 182 pages of appellee's brief on appeal as was humanly possible under the facts and in view of the law.

But before considering appellee's first contention we believe that the "Foreword" of the petition should be noted. It is there urged as the apology for the length of the petition and as an explanation of the duty of appellee's counsel in presenting the same, that this Honorable Court failed to observe, if this case be in law, that the findings of the trial Court, based upon conflicting evidence, are controlling herein, or, if this case be in equity, that the decision of the trial Court upon the questions of fact should not be interfered with unless clearly erroneous. This argument is repeated throughout appellee's petition. Counsel for petitioner adroitly leave in doubt whether this appeal is in law or in equity and overlook the cases cited by us in our reply brief on appeal,

Busch v. Jones, 184 U. S. 598 (1901);

Carnegie Steel Co. v. Colorado Fuel & Iron Co., 165 Fed. 195;

which hold that *when equitable jurisdiction once attaches it may not be lifted by subsequent conditions which would have necessitated the filing of the action at law if the action had not been filed until after the occurrence of such subsequent conditions.* This action was commenced in equity at a time when an equitable proceeding was proper and, under the doctrine enunciated by the cited cases, still remains in equity. As such, this Court may properly follow the rule applicable to equity cases on appeal. In

Waterloo Min. Co. v. Doe et al., 82 Fed. 45,

the judges of this Circuit pertinently stated at page 51:

> "It is further urged by appellees that this court is bound by the findings of facts of the Circuit Court, unless they are found to be clearly and palpably erroneous. On an appeal in an equity suit, the whole case is before the court, and it is bound to decide the same, so far as it is in a condition to be decided, on its merits."

But actually, whether this case is in law or in equity makes no practical difference in the consideration of the facts on appeal. It is fairly and properly stated by this Court at page 18 of the printed opinion:

> "There is practically no dispute in the evidence except with relation to the conversations between Hall and Pope on behalf of the Richfield Oil Company and of the officers of the Bank who participated in the same conversation."

The whole decision of the Court, as in fact of the trial Court, is not based upon any conflict in the evi-

dence, namely, as to whether certain things were or were not said or done, but as to the *legal effect* of the evidence: (1) whether the drafts herein involved were under the acceptance agreement; (2) whether the so-called instructions from Mr. Hall to keep the foreign transactions separate and apart amounted to a waiver of appellant's contractual or banker's lien, and (3) whether appellant's conduct after the receivership was a waiver of its contractual or banker's lien. These all are, in substance, questions of law to be determined from *subordinate* facts, namely, the facts upon which the conclusions are based. Obviously, this Appellate Court is at least equally as well qualified to draw such conclusions from the facts (which are actually not in dispute) as was the trial Court, although admittedly a trial Court is normally in a better position to determine what the facts themselves are. Irrespective of the binding nature of the trial Court's findings of fact or the extent thereof, *the Appellate Courts are not bound by the conclusions and inferences drawn by the lower Courts from such subordinate facts.* This distinction is recognized by a host of cases. In

Dunn v. Trefry (1919), 260 Fed. (C. C. A. First Circuit) 147,

at page 148, the Court said:

> "We recognize the rule that, where there is a conflict of testimony and the credibility of witnesses is involved, the finding of the District Court is not to be disturbed, unless it is clearly wrong. But where, as here, these circumstances are not present, *and the finding is a conclusion*

from admitted facts, we do not think the rule applies." (Italics ours.)

In *Munroe v. Smith,* 259 Fed. (C. C. A. First Circuit) 1, the Court said, at page 2:

"The case must turn upon the admitted facts, the inferences therefrom, and upon the interpretation of written evidence, in considering which, of course, the District Court had no substantial advantage over this court. *The usual rule of giving great weight to the conclusions of the trial Judge who observed the appearance and the manner of the witnesses is not, therefore, to any substantial degree, applicable in this case.* As we are not able to adopt the views of the District Judge it is necessary to deal in considerable detail with the evidence and necessary inferences therefrom." (Italics ours.)

In *The Natal* (1926), 14 Fed. (2) (Circuit Court of Appeals, Ninth Circuit) 382, Judge Gilbert held, at page 384:

"The rule that findings of fact are entitled to great weight in an Appellate Court is modified where, as here, they are based wholly upon depositions. But we do not regard the finding of fact here as depending upon conflicting evidence or the credibility of witnesses. *It rather depends upon admitted facts and the conclusions inferable therefrom.*" (Italics ours.)

In *Bender v. Bender* (1917 Mo. App.), 193 S. W. 294, the Court stated, at page 295:

"The trial court had the witnesses before it and was able to note the candor and frankness of

> each in testifying, and to note the willingness or the hesitation in answering questions; the readiness to volunteer matters that might appear favorable to one side or the other, or to attempt to hold back that which might prove prejudicial to the case of the party for whom they have been called as a witness * * * For these reasons the Appellate Courts are strongly inclined to defer to the findings of the trial courts in such cases. *However, it is elementary that the Appellate Courts are not bound by the conclusions reached by the trial court, but will examine the evidence and determine whether the proper result has been reached.*" (Italics ours.)

See also:

Rosenfield v. Wall (1920 Conn.), 94 Conn. 418, 109 Atl. 409;

Raftery v. Reilly (1918 R. I.), 41 R. I. 47, 102 Atl. 711;

Weigell v. Gregg (1915 Wis.), 161 Wis. 413, 154 N. W. 645;

and many others.

From the foregoing it is obvious that appellee's apology for the length of his petition herein is based upon a false premise, namely, that this Court was bound in any manner by the trial Court's conclusions and inferences from the facts. Nonetheless, we will consider *seriatim* the points urged in appellee's petition for rehearing.

I.

APPELLEE URGES:

"I.

THE HOLDING BY THIS COURT THAT PAROL EVIDENCE WAS CONFINED TO PROOF OF THE DELIVERY OF THE BILLS OF LADING ALONE IS ONE OF ORIGINAL IMPRESSION BY THIS COURT, IN CONFLICT WITH THE CONTENTION OF BOTH PARTIES AND THE ADMISSIONS OF APPELLANT AND WAS NEITHER DISCUSSED NOR GIVEN CONSIDERATION IN THE BRIEF FILED BY EITHER OF THE PARTIES HERETO. BY THIS HOLDING, APPELLEE HAS BEEN DEPRIVED OF A JUDGMENT OBTAINED BY HIM UPON A THEORY WITH RESPECT TO WHICH HE HAS NOT BEEN ACCORDED THE OPPORTUNITY OF BEING HEARD."

The most obvious answer to this contention is that the Court did not so hold. In support of this argument counsel cite from page 7 of the opinion to the effect that the acceptance agreement does not sufficiently identify the documents of security "without the consideration of parol evidence", and from page 2 of the opinion, which supports appellee's own contention that the references in the written agreements "may be explained by parol evidence." Counsel then cite from the Court's opinion:

> "The transaction between the parties was evidenced with clarity and definiteness by the written acceptance agreement, by the written documents accompanying the agreement, by the written acceptance endorsed by the Bank and by the letters exchanged and by the credit realized to

> the Richfield Oil Company upon nine drafts presented to the Bank for acceptance and needed no additional parol evidence to identify the subject matter of the contract and establish its terms." (p. 8.)

Counsel choose to consider—rather unfairly to the Court, we believe—the foregoing language "and needed no additional parol evidence" as limiting "the introduction of parol evidence to the delivery of the bills of lading." (Petition for Rehearing, pp. 4 and 5.) There is nothing in this or any other language of the Court which so limits the parol evidence. The quotation from page 8 of the Court's opinion is itself the answer to appellee's contention.

The Court concludes, as indeed have counsel for appellee both in argument and in their brief on appeal (Appellee's Brief p. 102) that the Bank, having possession of the shipping documents, was secured for the entire value of the cargo, and terminates its discussion of this particular phase of the transaction with the language on page 8 of the opinion (cited at page 4 of the Petition for Rehearing, and previously quoted herein) to the effect that no *further* parol evidence was *needed* to identify the subject matter of the contract. It is unfair to the Court to take, as counsel have throughout their petition, excerpts from various portions of the opinion, and without correlating them, finding apparent weaknesses which actually do not exist if these same excerpts are considered, as they should be, with the balance of the subject matter of which they are a

part. Thus, on page 4 of appellee's petition a quotation is taken first from page 7, then from page 2, then from page 8 and then from page 7, with no effort made to consider them in any related or logical sequence. But these very quotations which counsel claim show that the Court held that the parol evidence was confined to the proof of delivery of the bills of lading defeat counsel's purpose, notwithstanding the disarrangement of the sequence of the Court's declarations. Thus, counsel misconstrue the statement of the Court on page 8 that no additional parol evidence was *needed* to mean that further parol evidence was not admissible, and at the same time overlook the fact that in the very next paragraph the Court quotes verbatim appellee's contention as to the distinction between the short-term and long-term drafts. Here, as elsewhere in the opinion, the Court clearly indicates the full consideration which it has given to all of the many arguments presented by appellee.

Petitioner, in citing extensively from appellee's Brief on Appeal (Petition pp. 5-8) to establish the obvious fact that the question before the Court is as to what drafts were or were not security for the acceptances, attempts to distort the effect of these quotations into an inconsistency with the Court's holding. But nowhere in the opinion does the Court even inferentially state that the parol evidence upon which appellee most strongly relies, that is, the evidence to the effect that the 180-day Birla Bros. drafts were not to be considered as a basis for acceptances, was inadmissible. The Court does tacitly hold that such parol evidence, although admissible, did not amount to an

agreement by which the 180-day drafts would not be considered as security under the acceptance agreement. Obviously, the drafts and the proceeds thereof were security for the acceptances and in each case, delivered to appellant with identical accompanying letters of transmittal (Plaintiff's Exhibits 22, 23, 26, 27, 40 to 83 inclusive. Record 266, 291, 292 and 293) which referred to the enclosing therewith of invoices, insurance policy and accompanying bills of lading.

The Court considered the evidence which was presented with respect to the 180-day Birla Bros. drafts, including the letters of transmittal (one of which is set forth on page 6 of the Opinion), the Lyons letter delivered by Mr. Hall (Opinion p. 6), the acceptance agreement (Opinion p. 4) and concludes that no additional evidence was *needed* to establish that the 180-day Birla Bros. drafts, whose proceeds constitute the principal items of this appeal, were deposited under the acceptance agreement. The answer to petitioner's first contention is, therefore, both obvious and decisive. The Court did not hold that "parol evidence was confined to proof of the delivery of the bills of lading alone" but that the evidence presented and considered by it, including the great volume of parol evidence introduced by appellee, was sufficient to establish that these drafts and their proceeds were security for acceptances.

II.

AS HIS SECOND POINT APPELLEE URGES:

"II.

THE DETERMINATION BY THIS COURT THAT PAROL EVIDENCE WAS INADMISSIBLE TO ESTABLISH THAT THE SUBJECT MATTER OF THE ACCEPTANCE AGREEMENT DATED OCTOBER 4, 1930, AND THE CONSIDERATION FOR THE ACCEPTANCES RELEASED THEREUNDER CONSISTED SOLELY OF FOREIGN DRAFTS, AND THE CHARACTER OF SUCH DRAFTS, IS IN CONFLICT WITH THE THEORY UPON WHICH THE TRIAL WAS CONDUCTED BY BOTH PARTIES, WITH THE ADMISSIONS OF APPELLANT, INVOLVES A MISCONCEPTION OF THE WRITTEN EVIDENCE UPON WHICH SUCH DETERMINATION WAS REACHED AND LACKS JUSTIFICATION IN THE RECORD."

Much of what has been said by us in answer to appellee's first point is equally applicable to the second and will not therefore be repeated unnecessarily. Like the first point the second is based upon a false premise. The Court did *not* hold that parol evidence was inadmissible to establish the subject matter of the acceptance agreement. On the contrary (as noted in the quotation from page 7 of the opinion, set forth on page 10 of appellee's petition) the Court recognized the necessity of establishing the subject matter by parol evidence but held, with respect to the 180-day drafts and the proceeds thereof, that in view of the agreement itself, the written documents accompanying it, the written acceptance endorsed by the Bank, the letters exchanged, and the credit realized by Richfield

on the nine drafts presented to the Bank, no *additional* parol evidence was *needed*. (Opinion p. 8.) In attacking this conclusion petitioner urges that the acceptance agreement was a printed form not adaptable to the instant transaction and that the Court failed to give due recognition to the lack of familiarity of the Richfield officials with acceptances and acceptance agreement. Just how such use of a form or the ignorance of officials could affect the decision of this Court it is difficult for us to determine.

Counsel place most emphasis upon the reference in the Court's opinion to the fact that the bills of lading identified the "goods" mentioned in the acceptance agreement. They urge therefore that the Court's decision ignores or overlooks the numerous references, in appellant's and appellee's briefs, to "drafts" as security for the acceptances, and substitutes "bills of lading". But counsel themselves overlook the fact that the drafts in every instance were accompanied by shipping documents and bills of lading; that the drafts were required to be secured; that throughout the record there are numerous references to the advances made by appellant against *shipments* and to bills of lading and shipping documents; counsel forget the emphasis which they themselves placed upon the fact that when the 90-day drafts covering one-half of each of the Birla Bros. shipments were paid the remaining 180-day drafts would be without security, seeking to conclude therefrom that the 180-day drafts were not subject to the acceptance agreement. As stated at page 41 of appellant's Brief on Appeal:

> "The first items transmitted subsequent to the execution of the agreement are the four Birla Bros. drafts, and the Richfield Oil Company has on its own stationery, by its own officer, and in its own language, requested appellant to 'please release *against* this shipment $115,000 worth of acceptances'. As the shipment was represented by the sight *and* 180 day drafts, the release of acceptances was *against them.*"

We believe that it was upon this theory, viz., of a release of acceptances against *shipments,* that the Court reached the inescapable conclusion that the two 180-day Birla Bros. drafts were deposited under the acceptance agreement. In fact in an attempt to avoid this result appellee himself stated at page 102 of his Brief on Appeal:

> "Appellant undoubtedly satisfied itself that all of these customers were financially responsible except Birla Bros., Ltd., as to which certain adverse information was received from its correspondent in Calcutta. (R. 346.) As to the latter, however, no objection could be urged against sight drafts drawn by it *for the reason that such sight drafts had to be paid in full before the documents representing the shipment would be delivered.* (R. 401.)" (Italics appellee's.)

That the question of the security for the drafts (i. e. the goods shipped, represented by the bills of lading) was fully appreciated by counsel for appellee is illustrated not only by their brief on appeal but by testimony developed by them with great care and for some not entirely explained purpose. Thus, counsel

on cross-examination urged Gilstrap to admit that after payment of the 90-day Birla Bros. drafts the companion 180-day drafts were unsecured by any merchandise (R. 420), but that:

> "If the sight drafts had not been paid, we would then have had an advance to the Richfield Oil Company on these acceptances of $115,000, and as security for that, the shipment to Birla Bros." (Redirect examination R. 421.)

Counsel throughout sought to establish that the Bank was sufficiently secured by the 90-day drafts, with the accompanying shipping documents and bills of lading and did not *need* the added security of the 180-day drafts. How, then, can counsel now criticize the opinion of this Court because it adopted in substance the language of Mr. Lyons, Comptroller of Richfield Oil Company, as used in defendant's Exhibit "A", in finding that the acceptances were issued against and secured by the Birla Bros. *shipments?*

In support of their second point counsel urge:

"(a) The printed acceptance agreement was a mere form used to subserve the convenience of the parties and was not the form of agreement adaptable to the transaction being consummated."

As previously stated, the effect, if any, of this argument is difficult to understand. Both parties executed an agreement which, even though printed and even

though a form, was a binding obligation as between them. With reference to the parol evidence which might be introduced this Honorable Court upheld appellee's own contentions in the following language:

> "The appellee correctly contends that the written agreements must be construed according to their terms and that these terms are conclusive as to the agreement between the parties, but that the references therein to drafts and to the documents may be explained by parol evidence" (page 2),

but concluded that the 180-day drafts were subject to the acceptance agreement and therefore that the parol evidence rule excluded the introduction of evidence that they were not to be subject to the express terms of the written (printed) agreement.

Counsel next urge:

"(b) The officials of Richfield were ignorant of the use of acceptances and their mechanics."

Just how a recognition of the ignorance of the officials of Richfield could influence the judgment of this Court we confess our inability to understand, unless it be for the purpose of avoiding the damaging effect of the Lyons letter. (Defendant's Exhibit "A".) But the undisputed evidence does not support appellee's contention as to the ignorance of the officials of Richfield. There is no evidence that the use of acceptances was strange or unknown to Lyons or any

of the other officials of Richfield. It is true, as set forth in the quotation from the testimony appearing on page 18 of appellee's Petition, that Pope was sent to San Francisco to learn the *mechanics* of acceptance agreements, but to attribute to the officials of Richfield Oil Company ignorance regarding the substantial features of the transaction into which they were about to enter not only unjustly tars them with the brush of incompetency, but at best assumes something not in the record. Actually, Hall, with possibly a human desire to emphasize his importance in the transactions, stated on direct examination that it was *he* who suggested the use of acceptances. (R. 341.)

It is interesting to consider what possible success counsel for appellee may have in avoiding the effect of the Lyons letter on the grounds that the officials of Richfield were ignorant as to the nature of the transaction. Obviously counsel must get out from under the damaging effect of the word "shipment" as used in defendant's Exhibit "A". Lyons admittedly wrote the letter but counsel claim that Lyons was ignorant of the transaction. Yet, the record belies the charge of ignorance. Appellee's main witness, Hall, testified:

> "Upon returning to Los Angeles on the night of October 6th, I reported to Mr. McKee, the vice president of Richfield, *and Mr. Lyons, the Comptroller,* the result of my visit to San Francisco, and that this credit was in effect at San Francisco and ready for operation. I then returned to San Francisco and was entrusted with three letters and drafts and documents covering

> a shipment of goods to Birla Bros. at Calcutta, India. I brought the letter, Defendant's Exhibit 'A'. The change in the maturity date of acceptances from 120 days to 90 days on this letter is in my handwriting. I believe this change was made in the Wells Fargo Bank when I delivered the documents there." (R. 362.)

Not alone did Hall report to Lyons as to his visit to San Francisco and the arrangements for the credit, but he brought with him defendant's Exhibit "A" and changed the maturity date of the acceptances, as stated therein, from 120 to 90 days. He initialed the change but made no comment then or at any time as to the request in the letter "will you please release *against this shipment* $115,000 worth of acceptances * * *." In fact, in Hall's own language quoted above he stated that he returned with the letters, drafts and documents

> "covering a *shipment* of goods to Birla Bros."

and shortly thereafter testified with respect to the same transaction:

> "There would be four drafts, two on each *shipment* presented at that time under the acceptance agreement." (R. 362.)

Further in connection with this phase of the argument we respectfully call the Court's attention to pages 36 to 41 of our Brief on Appeal.

> Petitioner next argues:
>
> "(c) Both parties recognized and conceded that drafts, and drafts alone, constituted such security."

It is true that throughout the briefs counsel for both appellant and appellee presented to this Honorable Court the issue as to whether the drafts or the proceeds thereof were subject either to appellant's contractual lien under the acceptance agreement or to its banker's lien. At the time that the action was filed appellee's Ancillary Bill of Complaint referred to the *drafts* subject of this litigation and sought to compel the defendant bank to release such of the drafts as had not yet been collected and the proceeds of others thereof which had been collected. Subsequently appellee's Amended Ancillary Bill of Complaint sought recovery of the *proceeds,* all of the drafts having been collected. While the *drafts* were in the possession of the Bank or its correspondents they and the merchandise securing them were either security to the Bank pursuant to the terms of the acceptance agreements or subject to its banker's lien and right of set-off. Once the drafts were collected the *proceeds* thereof occupied the same legal position. Therefore, in pleadings, briefs and arguments the whole question before the Court was, first as to the drafts, and thereafter as to the proceeds being subject to the Bank's claim. That this was fully and properly recognized by the Court is evidenced by its statement at page 12 of the printed opinion:

> "We conclude that under the written acceptance agreements the Bank had a lien equivalent to a banker's lien upon the foreign bills of exchange covering the cargo of the 'Silver Ray' and 'Silver Hazel' and that under the law of California the Bank had a banker's lien upon the other two bills of exchange involved herein."

The Court considers and the exhibits and evidence sustain, but counsel for appellee carefully overlook, that had any of the drafts supported by shipping documents not been collected the Bank would have been compelled to realize on *shipments,* which were evidenced by shipping documents, particularly the bills of lading. The shipments constituted "goods" and "merchandise" and the bills of lading evidenced the goods and merchandise. None of the drafts, at the time of transmittal, were "clean paper" as referred to in the testimony of Mr. Gilstrap, heretofore quoted, in response to the hypothetical question as to what would have

> "happened had the 90 day drafts been paid and the 180 day drafts been unpaid." (R. 420.)

Counsel for appellee are in error in their statements, pages 21 to 28 of their Petition, that the parties were only considering drafts in determining the security for the acceptances. This error is obvious from a consideration of the numerous places in the record where shipments, shipping documents and bills of lading are referred to. Plaintiff's Exhibits 22, 23, 26, 27, 28 and 40 to 83 (R. 266, 268, 274, 275, 276, 277, 292 and 293) are the letters of transmittal which went

forward from Richfield to the Bank. These letters were in identical form to the letter of transmittal which appears on page 6 of the opinion. In every instance the heading of the letter shows the draft numbers, the drawers thereof and the ship. The body of each letter begins:

> "We are enclosing the following enumerated *documents covering shipment* going forward * * *."

Thereafter there is a description of the drafts, invoices, insurance policies and *bills of lading.* The drafts themselves (Plaintiff's Exhibits 22 and 23, R. 267 and 270) provide for release of "documents against acceptance", and contain the invoice number and the name of the ship. The acceptance register, Plaintiff's Exhibit 122, should likewise be considered (R. 394, et seq., 412, 413), in that it refers to the drafts, ships, merchandise and shipping documents. The letters of transmittal which went forward from appellant to its foreign correspondents (Defendant's Exhibit "F", R. 377 to 381, and Exhibit "G", R. 381) refer specifically to the shipping documents and on the copies retained by the Bank as its permanent records describe the Birla Bros'. shipments as "security for acceptances." The Lyons letter, Defendant's Exhibit "A", is a final link in the chain of documentary evidence that the security for the acceptances was *shipments* evidenced by *drafts* and *shipping documents.*

The record is replete with statements, both by plaintiff's witnesses and defendant's, wherein these ship-

ments are referred to interchangeably with drafts. See Pope's testimony with respect to defendant's Exhibit "A" (R. 316 and 317); Hall's testimony, page 362 and previously herein referred to, and Gilstrap's testimony:

> "Either Mr. Hall or Mr. Pope then stated that they were preparing a *shipment* to Birla Bros. I believe that in some previous conversation Mr. Hall had outlined to me in a general way the business that he did with Birla Bros. They stated that they wanted to raise as much money as possible against this particular *shipment,* and asked how much we would advance against the *shipment.*" (R. 374 and elsewhere on that page and on page 376.)

In the light of the foregoing it is impossible to give weight to petitioner's contention that the drafts alone constituted the security for the acceptances or to the complaint that appellee did not have a full opportunity, of which he availed himself with diligence and ability, to urge to the Court that the drafts should be separated, in legal consideration, from the shipping documents and shipments supporting them.

Simply stated, the logical sequence is this: the acceptances were issued on the security of "merchandise" and "goods", represented by bills of lading; the drafts were the evidence of the indebtedness owing from Richfield's foreign customers; when the merchandise and bills of lading were released, the drafts remained as security under the acceptance agreement. When the drafts were collected the proceeds were substituted.

Appellee further urges:

"(d) Bills of lading delivered to appellant merely as agent of appellee for delivery to consignee upon acceptance of drafts."

The answer to this contention is embodied in the foregoing consideration of subdivision (c) of Part II of appellee's Petition.

The fallacy in counsel's argument is in attempting to separate the drafts and the shipping documents. For example, counsel state and italicize for emphasis

> "None of the bills of lading were assigned by the Richfield Company to the Bank." (Petition page 29.)

Yet counsel will not deny that the bills of lading accompanied the drafts and occupied the same status. Counsel will not deny, and do not, that certain of the drafts were security for acceptances. Indeed, at page 28 of the Petition, it is stated:

> "While appellee contended that drafts were to constitute the security for the acceptances, his position was that under the agreement reached by the parties the short term drafts alone should constitute such security, the long term drafts being deposited merely for collection."

Yet, on the evidence introduced by appellee the mechanics of all transactions were the same. In every case the same form of letters of transmittal went forward to the Bank, accompanied by invoices and ship-

ping documents. (Plaintiff's Exhibits 22, 23, 26, 27, 28, 40 to 83, supra; R. 266, 268, 274, 275, 276, 277, 292 and 293.)

> **Counsel's final argument under point II of their Petition is that**
>
> **"(e) The so-called Lyons' letter (Defs. Ex. A) is lacking in evidentiary or controlling value."**

It has been incomprehensible to defendant and appellant throughout the trial, appeal and petition for rehearing in this case, that counsel for petitioner seek on the one hand to interpret the contract between Richfield and the Bank by constant reference to statements contained in correspondence emanating from the Bank, and on the other hand to deny evidentiary value or any effect to the all-important letter written at the time when the transaction was first consummated by the Comptroller of Richfield Oil Company, the so-called Lyons letter, defendant's Exhibit "A". As this Honorable Court has stated (Opinion p. 7) the proposed acceptance agreement still remained in the nature of an offer from the Bank to Richfield until the acceptance thereof on October 8, 1930, by the delivery of the transmittal letters dated October 7th, the drafts and shipping documents therein described, the Lyons letter of October 7th requesting the issuance of $115,000.00 worth of acceptances against the shipments, and the acceptance by the Bank thereafter of the nine drafts for $115,000.00. Counsel's efforts to

waive aside the effect of the Lyons letter and at the same time to hold the Bank accountable for every word appearing in any of its correspondence may be commendable in the interests of their client, but hardly proper as an attack upon this Court's decision. How counsel can hold the Lyons letter as "entirely unnecessary" is difficult to understand, in view of the fact that it was the letter which announced the consent by Richfield to the acceptance agreement and the request for the acceptance by the Bank of the first $115,000.00 of drafts to be issued thereunder.

This Court is told in the Petition for Rehearing that the transaction had been negotiated exclusively by Hall and Pope and that Lyons at no time participated therein and was ignorant of the transaction and the nature thereof. We have herein previously stated (supported by reference to the record) that Lyons, the Comptroller and financial official of the Company, was advised by Hall upon his return from San Francisco, of the nature of the transaction. We have likewise hereinbefore noted that Hall himself, the so-called negotiator of the transaction, delivered the Lyons letter, knew its contents and even went so far as to change in his handwriting the reference therein of 120, to 90 days, initialing the change. If Lyons was ignorant of the transaction we must assume that it was the type of ignorance which now makes it "folly to be wise".

Further in excuse of the language of the letter we are told that Richfield was in dire need of funds and Lyons was interested in getting the money quickly;

that if Hall had not come to San Francisco the letter would never have been sent; that subsequent letters written by Lyons indicated his truer understanding of the agreement; that the transaction was consummated at the time the letter was received and needed no further communications between the parties. (Yet immediately thereafter counsel argue that parol evidence was admissible at all times to identify the subject matter of the contract.)

Without burdening the Court with too minute a reply to these arguments, which more or less defeat themselves in their statement, it should be noted that the record is silent as to Richfield's need of funds or that the Bank knew of Richfield's having any need of funds, or that for any reason the Lyons letter should not be interpreted as it was written, namely, as the final act of acceptance of the proposed contract for the financing of Richfield's foreign transactions, written by the financial official of the Company, delivered and corrected by Hall, the head of the Foreign Department and the negotiator of the transaction; that the letter requested the acceptance of the first drafts under the new agreement, $115,000.00 against two Birla Bros. shipments, the drafts and shipping documents with reference thereto being delivered contemporaneously. To avoid the reference to "shipment" in this letter counsel state at page 33 of their Petition, that the evidence of all witnesses shows that the agreement relates to drafts and nothing else. We have previously referred to the Record, exhibits and testimony to establish the fact that the word "ship-

ment'' was used throughout and that as stated by this Court in its opinion:

> ''the foreign bills of exchange * * * were intended as a means of acquiring possession of the proceeds derived from the sale of the goods and substituting those proceeds for the goods themselves.'' (pp. 8 and 9.)

In closing this phase of our answer we respectfully desire to mention that the effect of the Lyons letter was presented at considerable length in our brief on appeal, pages 36 to 42, and answered to the fullest extent possible under the circumstances by very able counsel in appellee's brief, pages 91 to 97.

In concluding point II petitioner states that if by parol evidence it could be proved that the bills of lading constituted security under the acceptance agreement, it is inconceivable why by the same character of evidence it could not be proved that the drafts, or some of them, were to constitute such security in lieu of the bills of lading. This statement, we sincerely believe, is typical of the attempt by petitioner to confuse the issue before this Court by over-emphasizing the distinction between drafts and bills of lading. The drafts were in all instances accompanied by shipping documents and bills of lading which were to be released only against payment of the sight drafts and acceptance of the time drafts. The drafts were the means of acquiring possession of the proceeds derived from the sale of the goods which during the

shipment were represented by the bills of lading. To state, as counsel do, that appellee has not been given a full opportunity to show the subject matter of the contract is unfair to this Court in view specifically of its statement at page 2 of the opinion that:

> "The appellee correctly contends that the written agreements must be construed according to their terms and that these terms are conclusive as to the agreement between the parties, *but that the references therein to drafts and other documents may be explained by parol evidence.*" (Italics ours.)

APPELLEE'S DILEMMA.

These two first points urged by appellee in his Petition for Rehearing and which have, in the foregoing pages, been answered by us in detail, fail of their purpose of establishing appellee's right to a rehearing for an even simpler and more obvious reason than any of those heretofore advanced by us. If this Court were to grant a rehearing and to permit appellee to argue at length on these first two points, the utmost which appellee could accomplish would be to persuade this Court that it was in error in holding that the proceeds of the two Birla Bros. 180-day drafts were pledged as security not alone for the indebtedness of the acceptances but for

> "any other indebtedness due from Richfield Oil Company to the Bank, past, present and future" (Opinion p. 9.)

But if appellee is successful in persuading the Court that it was in error in its holding as to the 180-day

drafts, the sole result accomplished would be to place the proceeds of these drafts in exactly the same category as the proceeds of the Ricardo Velasquez draft in the amount of $1245.11 and the third Birla Bros. draft in the amount of $23,352.08. We stated repeatedly, both before the trial Court and on appeal, that defendant and appellant had been throughout confronted with a dilemma:

> "The drafts, the proceeds of which are the subject of this litigation, were either deposited under the acceptance agreement or they were not. If under the agreement, its language to the effect that they are security not alone for the acceptances issued thereunder, but likewise for 'any other liabilities from us (Richfield) to you (bank), whether then existing or thereafter contracted,' is controlling. The evidence is overwhelming that the drafts were deposited under the agreement." (Appellant's Brief pp. 166, 167.)
>
> * * * * * * *
>
> "But if, despite all this, it is believed that the drafts here in question were not deposited under the acceptance agreement, none the less, they are all subject to appellant's banker's lien or right of set-off." (Appellant's Brief p. 169.)

This Honorable Court has held that the proceeds of the two 180-day Birla Bros. drafts were subject to the acceptance agreement, but that the proceeds of the other two drafts in litigation were not under the acceptance agreement. As stated by the Court at page 9 of its opinion:

> "Moreover, we have examined the oral evidence concerning the arrangement between the parties and find nothing threin justifying the conclusion

> that the bank intended to waive its banker's lien upon the foreign bills of exchange deposited with it by the Richfield Oil Company, as we will now point out in connection with the two other bills of exchange involved in this appeal."

After considering these two other bills of exchange and the evidence with respect to them and related drafts, the Court states at page 12 of the decision:

> "We conclude that under the written acceptance agreements the bank had a lien equivalent to banker's lien upon the foreign bills of exchange covering the cargo of the 'Silver Ray' and 'Silver Hazel' and that under the law of California the bank had a banker's lien upon the other two bills of exchange involved herein."

It is pertinent to ask therefore: What will it avail appellee if this Court agrees, in their entirety, with the arguments propounded in appellee's points I and II, grants a rehearing and even modifies its opinion to hold that the proceeds of these two 180-day drafts were not subject to the acceptance agreement? Appellee will forthwith be impaled upon the other horn of the dilemma, that the 180-day drafts and their proceeds must be considered in the same manner as the draft of Ricardo Velasquez and the third draft of Birla Bros., and therefore subject to a banker's lien. What does this avail appellee? Only that appellant is entitled to keep the proceeds on the theory of banker's lien as recognized by the Court, instead of on the theory of a contractual lien. How, therefore, can a further hearing benefit appellee if the sole possible result of such a hearing would be to permit him to

establish that while he is entitled to recover the draft proceeds on one theory nonetheless the Bank is entitled to retain them on another?

Of course, it is needless to state that we do not for a moment admit that there was any error in the Court's decision that the 180-day drafts were subject to the acceptance agreement. We urged, but this Court did not agree, that all of the drafts, including the Ricardo Velasquez draft and the third Birla Bros. draft, were subject to the acceptance agreement. In view of the evidence surrounding the delivery of the 180-day drafts, including particularly the Lyons' letter, a different consideration of these particular drafts, as determined by this Court, is entirely tenable.

In the foregoing argument we stated advisedly that it would avail appellee nothing to have a rehearing granted because the utmost he could hope for would be a recession by the Court from its position that the 180-day drafts were subject to the acceptance agreement, with the consequent necessary determination by the Court that they were subject instead to appellant's banker's lien. We made this statement advisedly because, in all sincerity, we believe that the succeeding two points urged by appellee, namely, (1) that the foreign collections should be deemed separate and apart from other business of Richfield and not subject to banker's lien, and (2) that the appellant subsequently waived its banker's lien, present no arguments which were not advanced in appellee's brief on appeal and on oral argument and fully considered by the Court in its decision. However, in substantiating this statement we will briefly consider these last two points.

III.

AS HIS THIRD POINT APPELLEE ARGUES:

"III.

IT IS DEFINITELY PROVED THAT ALL FOREIGN COLLECTIONS SHOULD BE DEEMED TO BE SEPARATE AND APART FROM OTHER BUSINESS OF RICHFIELD WITH AND ITS FINANCIAL OBLIGATIONS TO APPELLANT BANK."

Counsel attack, particularly, the language of the Court at pages 11 and 12 of the Opinion and quote the same at length. However, in their criticism of the Court's conclusion that the separation of the accounts did not operate as a waiver of banker's lien, counsel neglect to comment upon the cases cited in the opinion, particularly:

American Surety Company v. Bank of Italy (1923), 63 Cal. App. 149,

which, as set forth in our Brief on Appeal (pp. 91 to 95), presents such a strong analogy to this phase of the instant matter.

We submit that this Honorable Court has not, as counsel suggest, based its decision on a misconception of the evidence with respect to the so-called Hall-Pope agreement or a misunderstanding of appellee's position as to the application of this agreement to the two types of drafts. The Court has sustained in this connection the position of appellant, argued in our Brief on Appeal from pages 74 to 110, that to the extent that drafts were not deposited under the acceptance agreement they were subject to defendant's

banker's lien and right of set-off, even though the conclusion of the trial Court that Hall directed the Bank to keep the transactions of the Foreign Department separate and apart from the other transactions of Richfield and the Bank, be accepted as true.

It should be noted that in accepting this conclusion of the trial Court this Appellate Court has given the fullest recognition required by the authorities cited at the beginning of this Answer to the findings of the trial Court. In other words, it is not incumbent upon the appeal tribunal to draw the same inferences and conclusions of law from the findings of fact as the trial Court did, but only to give recognition to its factual conclusions upon conflicts in testimony.

> **In this phase of counsel's attack upon the court's opinion, they urge:**
>
> **"(a) Appellee does not claim that any distinction was made between the two types of drafts in the so-called Hall-Pope agreement."**

When appellee argues that the so-called agreement to "keep separate and apart" applied to all foreign collections we submit that he is taking an illogical position which must necessarily be fatal to him. The Court has recognized this, particularly at pages 8 and 9 of the opinion, wherein it is emphasized that the agreement to keep separate and apart, assuming that it did exist, was an oral agreement and was in direct conflict with the express language of the written ac-

ceptance agreement. As appellee must and does admit, at least *some* drafts were under the acceptance agreement and subject to its terms. If the subject matter of the oral agreement was, as counsel contend, applicable to *all* drafts, it is in fact in conflict with the written terms of the acceptance agreement; evidence of such oral agreement is therefore, on appellee's own theory, inadmissible under the parol evidence rule.

Throughout the trial we objected to the introduction of any evidence as to the purported agreement negotiated by Hall to keep the Foreign Department transactions separate and apart. (R. 264.)

Appellee insists that the so-called Hall-Pope agreement

> "related to and embraced *all* of Richfield's foreign business with appellant bank."

Appellee is however forced to admit that the Bank had a right to apply against any other indebtedness owing to it from Richfield the proceeds of any drafts deposited under the acceptance agreement, notwithstanding the so-called Hall-Pope agreement. Where, however, the acceptance agreement did not apply, on appellee's theory, the Hall-Pope agreement came into effect. The extent to which able counsel must go to bring these two agreements into some form of consistency is extremely interesting. Analyzed it is this: that there was an agreement between the Bank and Richfield for all of the Foreign Department transactions providing that they were to be kept separate and apart from other transactions, but that within this

larger circle of all transactions there was, at the same time and negotiated by the same parties, another agreement whereby certain of the Foreign Department transactions were, by virtue of the operation of the acceptance agreement, expressly subjected to any other indebtedness of Richfield to the Bank. That such conflicting transactions could not have been entered into by reasonably thinking business persons is obvious. Taking a position, as the Court did, most liberal to appellee, the conclusion is inevitable: that if the Hall-Pope agreement is applied to *all* of the drafts it is in conflict with the written acceptance agreement, but if it applies only to those drafts which were not deposited under the acceptance agreement its legal effect may then be properly considered, and is that the transactions of the departments were to be kept separate without however any express or implied waiver of banker's lien.

It should be noted in passing that counsel contend that the acceptance form of transaction was entered into upon the initiative of the Bank (appellee apparently seeking thereby to explain the conflict between the written and oral agreements). As a matter of fact, Hall himself claimed to have suggested this form of transaction. He stated on direct examination

> "Then *I* brought up the subject of the use of acceptances." (R. 341.)

and on cross-examination

> "At this conversation I believe *I* brought up the question of acceptances, and told Mr. Gilstrap I thought it was the best way of handling the Richfield Oil Company's business." (R. 354.)

> Appellee next urges that
>
> "(b) The agreement between Hall and appellant officials that all drafts and their proceeds should be deemed to be separate and apart from other business of Richfield with and its financial obligations to appellant constituted such drafts and proceeds a special fund and a deposit against which no banker's lien or right of set-off existed."

In this phase of his argument appellee restates a very substantial part of his Brief on Appeal. (pp. 13 to 25 and 139 to 156.) Inasmuch as appellant in its Brief went into this matter at considerable length (pp. 74 to 110) we hesitate to again burden the Court with further comment. We desire to emphasize, however, that our argument accepts the truth of Hall's statement and gives full recognition to the trial Court's finding of fact, that he urged upon the bank officials that the transactions of the Foreign Department were to be kept separate from the other transactions of Richfield. In other words, he, having apparently an interest, as this Court recognized, in commissions, desired that for reasons of convenience or otherwise the accounts be kept separate. This does not, as we emphasized in our Brief, amount to an agreement waiving a lien, either as a matter of fact or as a matter of law. The very knowledge of Hall and the other officials of Richfield, and which counsel emphasize at page 44 of their Petition, as to

the existence of a banker's lien and right of set-off, defeats any attempt to imply such agreement from general language to keep a transaction separate and apart. If a lien or right of set-off was to be waived the waiver should have been in express terms. This is a matter of common sense. It is more than that—it is required by the law as noted in the cases cited by this Court and in those set forth on pages 91 et seq. of our Brief on Appeal. We desire to further emphasize in passing that appellee assumes in his Petition some facts which are not in evidence, namely, as to the financial condition of Richfield and its action in view of that condition. The only evidence as to Richfield's financial wants is a single statement by Hall that he knew at the time that the Company was pressed for ready cash. (R. 341.) On the other hand, the Bank had, in July of the same year, renewed the Richfield loan and had increased it by $125,000.00. The evidence indicates that the Bank thought Richfield's financial condition satisfactory. If, however, as counsel contend, Richfield was known by its officials to be tottering on the brink of economic disaster, and the foreign collections were part of its "life blood", and if by the same token Hall and the other officials, knowing of the bank's right of lien and set-off, and fearing it, wanted some assurance that the Bank would take no action to enforce such lien or right of set-off, why was not the so-called agreement *express* upon that point? Instead only, as Mr. Hall testified, that

> "any transactions were to be considered separate from other transactions of the Richfield * * *" (R. 340.)

The answer is quite obvious:

Neither Mr. Hall nor the officials of Richfield intended an agreement to waive any of the bank's rights of lien but desired the transactions kept separate. We may assume grave doubts as to whether this or any other bank, dealing in the future, would have waived its banker's lien or right of set-off, especially if it knew, as appellee suggests, of its debtor's precarious financial status. Furthermore, we may well doubt whether any practical benefits to Richfield would have resulted from a waiver of lien if we bear in mind that even without a lien or right of set-off the Bank might have commenced an action on the general indebtedness when the same became due and attached or garnisheed the foreign collections.

In concluding this argument we desire again to emphasize that this Honorable Court has given full and complete recognition to the findings of fact of the trial Court, ignoring only, as is proper, its erroneous inferences and conclusions unjustified in law.

IV.

AS HIS FINAL CONTENTION APPELLEE URGES:

"IV.

APPELLANT BANK WAIVED ITS BANKER'S LIEN AND RIGHT OF SET-OFF AS AGAINST ALL COLLECTIONS OF RICHFIELD EXCEPTING THOSE SPECIFICALLY DEPOSITED UNDER THE ACCEPTANCE AGREEMENTS."

As reluctant as we were to unduly burden this Court with an over-lengthy reply to the other points urged in the Petition for Rehearing, still more reluctant are we to again answer this final argument at unnecessary length.

The Court in its opinion considered fairly and fully all of the points urged by appellee on the appeal. Pages 12 to 17 consider particularly the question as to the waiver by appellant, by word or conduct, of its right to apply the proceeds of the drafts herein in question either under its contractual or banker's lien. This Court considered the Receiver's request for the restoration of the cash balances, the bank's response and its action thereon; it considered the language of the telegram of the Bank wherein it reserved its right of lien against the collections which were security for acceptances and its right to banker's lien. It places the only possible reasonable interpretation upon the exchange of letters and telegrams: that the Bank was willing to restore to the Receiver the full cash balance and did restore initially in excess of $40,000.00. The Court noted, as

we suggested in extenso in our Brief on Appeal, that the Receiver was requesting a restoration of the "cash balances", and that the appellant Bank complied with this request but as a matter of precaution informed the Receiver in its telegraphic response that it was reserving its rights against the foreign collections. As the Court properly states, if we take the Receiver's telegram by its four corners, it obviously refers to the restoration of the checking account in the Bank so that the Receiver would stand in the shoes of the Richfield Oil Company. The reply is, "We are willing to restore balance in checking account". This was an acceptance of the Receiver's proposal subject to similar action by other banks.

As to the reserved rights, the Court concluded that with respect to the 180-day drafts, the Bank expressly reserved its rights to them (being under the acceptance agreement) irrespective of whether it was obligated by law so to do. With respect to the proceeds of the remaining drafts subject of this litigation, the Bank reserved in its telegram, if construed with "technical nicety", its "banker's lien on these collections" or, if the telegram is construed from a "broader view", it did not include them within the checking account which it had been requested to restore.

The Court thereafter considered the effect of the Bank's conduct in subsequently returning to the Receiver additional sums and in filing its claim in the receivership proceedings. From all of this it is properly concluded that there was neither in law or in fact a waiver by the Bank nor was there any estoppel

upon it to assert thereafter its proper legal rights. The opinion itself presents the best and most decisive answer to appellee's contentions.

We could be more detailed in our reply to each of the statements made by counsel at pages 51 to 65 of the Petition, but in view of the language of the opinion see no purpose in so doing. However, we again call to the attention of this Court that counsel's assumption that the appeal Court is bound by the findings of the lower Court as to the *effect* of the telegraphic exchange or conduct of the bank, is in conflict with the cases cited in the earlier part of this answer.

We likewise feel obliged to comment upon appellee's citation from the opinion of the Court at page 17 as to the subsequent conduct of the other banks. In criticising the Court's conclusion counsel emphasize the statement that

> "Their conduct was not brought home to the appellant and is of no significance whatever * * *"

and completely ignore the Court's subsequent language:

> "* * * even if brought to the attention of the bank after the transaction was closed would be without significance. * * *"

In other words, just as counsel could obtain small comfort from a reconsideration by this Court of its determination that the 180-day Birla Bros. drafts were subject to the acceptance agreement because even if they were not they were still subject to appellant's

banker's lien and right of set-off, so here counsel could obtain equally little comfort from a reconsideration by this Court as to whether the subsequent conduct of the other banks was brought home to the appellant because, even if brought home, it would be without significance.

But a reconsideration is, we submit, not necessary. While it would be presumptuous upon our part to remark that the Court's opinion is sound and well reasoned, we cannot refrain from stating in concluding this brief, that on few occasions do counsel on both sides experience the satisfaction of having an appeal Court, in its decision, review the voluminous evidence and the extensive arguments with such care and thoroughness as in the instant matter.

We submit, therefore, that the petition for a rehearing should be denied.

Dated, San Francisco,
August 15, 1934.

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